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May [illegible], 19[illegible].

[illegible], Washington, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

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No. 815

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COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, *Petitioner*,

v.

VICTORY TRANSPORT INCORPORATED, *Respondent*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES

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The Solicitor General of the United States, in response to the invitation of the Court, has filed a brief *amicus curiae* in which he suggests that the petition for writ of certiorari should be granted "if the Court is satisfied that petitioner has presented, or intends to

present, both aspects of the sovereign immunity question" discussed by him.

The petitioner hereby assures the Court that all relevant aspects of the sovereign immunity doctrine will be briefed and argued by the petitioner in connection with the two questions presented in the petition. Rule 23 (1) (c) of the Court's Rules provides that the questions presented for review "will be deemed to include every subsidiary question fairly comprised therein." And it is petitioner's belief and intention that the two questions as to the sovereign's consent to *in personam* jurisdiction and the propriety of extraterritorial service on a foreign sovereign fairly comprise all pertinent aspects of the sovereign immunity doctrine.

Petitioner reiterates, however, its firm position that the commercial or governmental nature of the shipping transaction here involved should not be decisive of the jurisdictional and service questions, and that there is no way under accepted principles of international or domestic law in which a federal court can acquire *in personam* jurisdiction over a foreign sovereign without its express consent directed to the court at the time of suit. As the United States argued in its *Hellenic Lines* brief to the District of Columbia Court of Appeals [see Petitioner's Reply Brief, p. 3], the policies enunciated in the Tate Letter with respect to so-called commercial transactions—and the policies which the court below followed—"apply only to situations where a court has already acquired jurisdiction over a foreign sovereign under the rules of the forum" and do not "purport to change, and could not change, the law of the United States as to how personal jurisdiction can

be obtained over a nonresident foreign sovereign entity."

In other words, the debate between the so-called restrictive and the absolute theories of sovereign immunity as to the imposition of liability should follow rather than precede the initial problem of asserting *in personam* jurisdiction over a foreign sovereign. The Solicitor General has himself acknowledged that so distinguishing between the question of *in personam* jurisdiction and the question of immunity from the imposition of substantive liability is worthy of this Court's consideration. And if this Court were to conclude that the sovereign petitioner had not consented to the assertion of *in personam* jurisdiction or not been properly served, the case would be at an end without need for consideration of some of the more difficult issues of immunity as to the imposition of liability. In suing the sovereign Queen of England on an *in personam* basis, one must first establish some form of consent on her part and effectuate some form of proper service on her—failing which the attempt to sue her in a federal court must fail without regard to her immunity to imposition of liability.

But in considering these basic jurisdictional problems, it will be necessary for the Court and counsel to explore the relevant policy considerations underlying the sovereign's immunity from suit without consent and its immunity from ordinary service of process. Certainly the respondent, and presumably the Government, will maintain that the commercial nature of the transaction stripped the petitioner of its ordinary immunity and permits it to be treated as a foreign corporation or association. And the respondent and the Government will be free to urge, if they desire, that the so-

called restrictive theory of immunity destroys petitioner's objections to jurisdiction and service. Contrariwise, petitioner will maintain that, as to jurisdiction and service, petitioner has an immunity that is unaffected by the alleged commercial nature of the transaction and that such immunity is not waived except by express action by the sovereign directed to the court.

All of the considerations thus suggested by the Solicitor General only add to the substantiality of the questions presented and to the appropriateness of review by this Court. Once this Court grants certiorari, the plenary jurisdiction over the case permits all relevant matters to be considered and resolved. And while the Court might want to consider the advisability of directing the parties to argue all aspects of the sovereign immunity doctrine, petitioner can assure the Court that even without such a direction all of the relevant considerations will be fully briefed and argued.

Respectfully submitted,

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